Office-Supreme Court, U.S.
FILED
FEB 5 1983
ALEXANDER L. STEVAS,
CLERK

82-1427

No.

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982

HELGA MARIE ADAMS, JENI MUMMERT, a/k/a
JENI PROCTOR, and RAYMOND JAMES PROCTOR,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

Petition for Certiorari - Criminal Case

EARLE A. PARTINGTON
Suite 200
250 S. Hotel Street
Honolulu, Hawaii 96813
(808) 533-7491
Attorney for Petitioners

QUESTIONS PRESENTED

I. Does the interpretation of 18 U.S.C. 2511(2)(C) adopted by the Court below, unconstitutionally impair the State of Hawaii's integrity and ability to function in our system of federalism, by authorizing State agents to violate state law?

II. Does such an interpretation contravene the legislative scheme of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, et seq. (Hereinafter referred to as Title III), which permits states to more restrictively

protect their citizens' rights to privacy.

III. Does such an interpretation violate the Petitioners' rights to equal protection under the Fourteenth Amendment to the United States Constitution.[1]

---

[1]The parties to the proceeding in the United States District Court were Helga Marie Adams, Masaru Shingaki, Jeni Mummert, a/k/a Jeni Proctor, and Raymond James Proctor (Defendant-Appellants), and the United States of America (Plaintiff-Appellee).

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities.	iv
Opinions Below.	vi
Jurisdiction Grounds in This Court. .	vi
Constitutional and Statutory Provisions	vi
Statement of the Case	2
Existence of Jurisdiction Below . . .	7
Reasons for Granting the Writ	8
Conclusion.	18
Appendices A-E.	Attached

TABLE OF AUTHORITIES

CASES	Page
Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)	11,15
United States v. Hall, 543 F.2d 1229, (9th Cir. 1976) (en banc), cert denied, 429 U.S. 1075 (1977).	8,9, 10,13, 15
United States v. Keen, 508 F.2d 986, (9th Cir. 1974), cert denied, 421 U.S. 929 (1975)	9,16
Weeks v. United States, 232 U.S. 383 34 S.Ct 341, 58 L.Ed. 652 (1914)	11, 15

CONSTITUTIONAL PROVISIONS

	Page
Article I, Section 7, Hawaii Constitution	v,2
Fourteenth Amendment, United States Constitution	vii
Tenth Amendment, U.S. Constitution.	vi

STATUTORY PROVISIONS

18 U.S.C. 371	viii,8
18 U.S.C. 2252(a)(1)	viii,8
18 U.S.C. 2252(a)(2)	viii,4,8
18 U.S.C. 2510(7)	12
18 U.S.C. 2511(2)(c)	5,6,8, 14,18
18 U.S.C. 2516(1)	9,14
18 U.S.C. 2516(2)	9,14,17
18 U.S.C. 2517(1)	12
18 U.S.C. 2517(2)	12

Opinions Below

The opinion of the Court of Appeals below (Appendix A) was not reported. The opinion of the District Court below (Appendix B) was not reported.

Jurisdictional Grounds in This Court

The judgment of the Court below (Appendix A) was entered on December 7, 1982. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions

1. Article I, Section 7 of the Hawaii State Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

2. The Tenth Amendment to the United States Constitution, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the the people.

3. The Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. The statutes under which Petitioners were prosecuted, though nothing turns on

their terms, were 18 U.S.C. 371, 2252(a)(1), and 2252(a)(2), the terms of which are attached hereto as Appendix D.

5. The statute under which the Government obtained electronically recorded evidence against the Petitioners was Title III, the relevant portions of which are attached hereto as Appendix E.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HELGA MARIE ADAMS, JENI MUMMERT a/k/a JENI PROCTOR and RAYMOND JAMES PROCTOR

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Certiorari - Criminal Case

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Relevant Facts

At the 1968 Hawaii State Constitutional Convention, Article I, Section 7 of the Hawaii Constitution was amended. Section 7 was originally in the exact language of the Fourth Amendment to the Federal Constitution, but since 1968 has read (underlined portions represent the amendments): "The right of the people to be secure . . . against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue, but upon probable cause . . . particularily describing the

place to be searched . . . or the communications sought to be intercepted."

This case arose as a result of a joint Federal-State undercover operation involving a U.S. Customs agent and Honolulu Police Officers. Posing as a pornography distributor, the federal agent had a number of personal and telephonic conversations with the Defendant-Petitioners. These communications were, without a warrant, electronically recorded by the state officers, and served as the basis for a federal search warrant. This search of Petitioner Proctor's home revealed a large quantity of sexually explicit material. The tape recordings and transcriptions of such intercepted communications, video tapes of such personal meetings, and said

material seized from Petitioner Proctor's home later served as nearly all the physical evidence at trial.

B. Course of Proceedings in the case below

The Petitioners were first indicted on such evidence under Hawaii state law, on June 10, 1980. However, on April 27, 1981, the State Circuit Court struck down on constitutional grounds the state statute under which they were indicted.

On August 7, 1981, the Petitioners were indicted under 18 U.S.C. 2252(a)(2), which prohibits the receipt and distribution of obscene print material involving minors. The Petitioners' Motion to Suppress the Evidence Resulting from Interception of Wire and Oral

Communications was denied by the United States District Court, (App. B.) and after a bench trial the Petitioners were convicted.

In affirming the convictions, the Court of Appeals for the Ninth Circuit did not reach several critical issues presented here. The Court held that the relevant evidence was admissible in Federal Court proceedings "without regard to state law", and that as such, it was not necessary to reach the issue of the legality of the evidence under Hawaii Law (App.A.). Support for this proposition stemmed from the consensual interception exception of Title III, 18 U.S.C. 2511(2)(c), and Ninth Circuit caselaw. Section 2511(2)(c) exempts from the general warrant requirement and makes

it not illegal under Title III to intercept communications in which one party to the communication consents to such interception.

The court also did not address the fundamental issue of whether or not Title III incorporates and respects state law with respect to the privacy of its citizens. Instead, the Court of Appeals simply stated that the evidence conformed to federal law, and that, as such, the District Court did not err in admitting it. The Defendant-Appellants argued that clear legislative history shows that Congress intended that Title III would allow more restrictive state law to be effective, notwithstanding the section 2511(2)(c) exception.

The basic issue of this case thus

arises from the lack of an answer as to whether Title III incorporates such state law, which more restrictively protects the privacy of its citizens, and whether the violation of such state law by state officers in cooperation with federal officers violates Title III itself. Petitioners have asserted below and assert here that the foregoing interpretation of Title III, permitting the admissibility of evidence obtained illegally under state law by state officers, in cooperation with federal officers, constitutes a violation of Title III and violates established principles of federalism.

EXISTENCE OF JURISDICTION BELOW

Petitioners were convicted in the United States District Court for the

District of Hawaii of various counts relating to receiving, shipping and distributing obscene print media involving minors, under 18 U.S.C. 371, and 18 U.S.C. 2252(a)(1) and (2).

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

The Court of Appeals essentially held that the section 2511(2)(c) exception to the warrant requirement is oblivious to state guarantees of privacy, without saying why such is, or should be, the case. For this ruling the court cited two of its own cases, United States v. Hall, 543 F.2d 1229, 1234-35 (9th Cir. 1976) (en

banc), cert denied, 421 U.S. 929 (1975), and United States v. Keen, 508 F.2d 986, (9th Cir. 1974), cert denied, 421 U.S. 929 (1975). By way of footnote, the court called "irrelevant" the fact that in both of these cases, only federal officers performed the recording, whereas here state officers did the work (App.A).

Yet in Hall, even after stating that "federal officers are authorized to wiretap under [Title III's] section 2516(1)", that court still had to acknowledge that "it is only wiretapping by state officers under (2516(2) which requires further authorization by state statute." 543 F.2d at 1232. [Emphasis added]. And only with the qualification, "[w]ith the lone exception concerning interception by state officers" could the

Hall court conclude that Title III "does not defer to the States." Indeed, Congressional intent that the act would not override stricter state laws is so clear that the Hall majority acknowledged this too. 543 F.2d at 1232.

Why then, did the Hall court hold that evidence obtained in violation of state law was "not necessarily inadmissible" in Federal Court? [Emphasis added]. This limitation on the non-admissibility of such evidence has not adequately been addressed by the Court below, and Petitioners contend that in light of the legislative scheme of Title III and the express reservation to the States to more restrictively protect their citizens' rights to privacy, such evidence indeed should be inadmissible in federal

courts.

As dissenting Judge Koelsch candidly noted in Hall, this kind of backpedalling "unduly warps established legal principals", and "endorses a novel variation on the sort of illegal trade-off repudiated by the Supreme Court in Elkins v. United States, 364 U.S. 206 (1960)." In admitting such evidence in Federal Court proceedings, the Ninth Circuit has promulgated a new Weeks-type "Silver Platter" doctrine. As long as federal agents will accept the evidence, state agents can and will violate state law with impugnity. Such a result not only ignores the holding of Elkins, 364 U.S. at 213-16, but the legislative intent of Title III, which a Senate Committee declared as being the continued protection of privacy of

wire and oral communications. 1968 U.S. Code Cong. & Admin. News, p. 2153.

Further, the wording of the relevant provisions themselves demonstrates that Congress did not intend that its legislation induce state officers into illegally producing evidence. Section 2517 governs the receipt, disclosure, and use of wiretap-derived information by "law enforcement officers", and this term, according to section 2510(7), includes <u>state</u> officers. Sections 2517(1) and 2517(2) permit such information to be disclosed and used, but <u>only</u> "to the extent such use is appropriate to the proper performance of [their] official duties."

Petitioners submit that through this language, "Congress meant to

incorporate into Title III state-imposed limitations on the conduct of state officers." Hall, 543 F.2d at 1240 (Koelsch dissenting). To conclude otherwise, as the reasoning of the Ninth Circuit requires, is to find that Congress meant to induce and encourage state agents to violate their own states' laws. Petitioners submit that such is not the case, and neither did Congress intend to conscript into Federal employ the officers of unwilling states such as Hawaii. 543 F.2d at 1240.

If Title III does incorporate and leave effective state laws which require warrants for eavesdropping by state officers, (and Petitioners submit that Hawaii law so requires), then the admission of the evidence here violated

federal law; i.e., Title III.

What has happened in the action below is this: The warrant exception of section 2511(2)(c) has been given a loose andoverly broad reading by the government.[2] This erroneous interpretation has lead to the unpremised conclusion that section 2511(2)(c), in creating an exception for federal agents, affirmatively authorizes state agents to violate state law, and thus, that it preempts state law. This is simply incorrect. The statute itself and accompanying Senate Reports are replete

---

[2]The government even contends, for example, that section 2511(2)(c) authorizes the interception of communications for the investigation of crimes not even enumerated by Title III. Section 2516 provides an exhaustive list of crimes for which a judge may authorize an interception, and pornography is noticeably absent from this list.

with references to the permissible co-existence of parallel state laws with Title III, such as "[t]here is no intent to pre-empt state law." 1968 U.S. Code Cong. & Admin. News, p.2181 (citations omitted). While Congress may have intended cooperation between state and federal agents, it did not mean to direct us to revoke the holding of Elkins and reimbrace the error it found in Weeks v. United States, 232 U.S. 383 (1914).

This case thus involves a question of critical public concern and social importance: Can the federal government undermine state law, through a peculiar interpretation of a federal statute, premised upon the notion that "[a]t common law, evidence was admissible regardless of its illegal origins"? Hall,

543 F.2d at 1235, quoting Keen, 508 F.2d at 989. This question should be rhetorical, but the Ninth Circuit has apparently thought otherwise. If the answer is affirmative, our system of federalism is waning, and citizens of states like Hawaii may eventually lose all benefit of their states' protection and unique policies.

Further, if the answer is positive, an equal protection dilemna is spawned. The government's interpretation of this warrant exception sets up two classes of people:

(1) Citizens whose communications are intercepted by state officers pursuant to a state warrant; and

(2) Citizens whose communications are intercepted by state officers

pursuant to no warrant, but only the consent of one party.

The first class of state residents will be fully protected by state law and judicial scrutiny, while the second class of state residents will be afforded no protection of state law. Section 2516(2) requires that, when a state officer proceeds under a state warrant, he must strictly conform to state law. The government's interpretation of Title III would have the second class of people entitled to no judicial scrutiny, and also having to bear the burden of evidence admitted against them even if it is in clear violation of state law. This sort of double vulnerability for a class of state residents surely could not have been intended by Congress. Nor,

Petitioners submit, can this classification worked by the government sustain even the "minimum scrutiny" test, assuming arguendo that such is all an infringement on the right to privacy requires. The government has made no showing that such a classification is rationally related to the achievement of a legitimate government purpose.

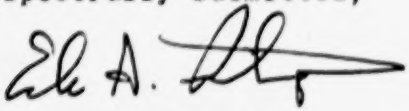
Given that the primary purpose of Title III is the protection of privacy rather than the erosion of privacy, it is completely inconsistent with such primary purpose that section 2511(2)(c) could properly result in such an irrational classification.

CONCLUSION

Petitioners assert that the Ninth

Circuit has accepted a faulty and dangerous interpretation of this federal statute, based on erroneous premises. We present to this court a major legal issue, the answer to which will affect both citizens' rights to privacy, and the integrity and indeed, viability, of states in our system of federalism. This Petition for a Writ of Certiorari should therefore be granted.

Respectfully Submitted,



EARLE A. PARTINGTON
Counsel for Petitioner Proctor
and on behalf of PETITIONERS
ADAMS and MUMMERT
Suite 200
250 S. Hotel Street
Honolulu, Hawaii 96813
(808) 533-7491

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OPINION

Appeal from the United States
District Court, for the
District of Hawaii
Samuel P. King, District Judge, Presiding
Argued and Submitted November 4, 1982

Before: CHOY, SNEED and FARRIS,
Circuit Judges.

CHOY, Circuit Judge:

Appellants Adams, Shingaki, Mummert, and Proctor were convicted on various counts relating to receiving, shipping and distributing obscene print media involving minors. All four appellants challenge their convictions on the ground that the district court improperly failed to suppress evidence obtained through a joint federal-state wiretap. Appellants

Proctor, Shingaki, and Mummert also claim that the district court's failure to dismiss certain counts of the indictments against them violated the Speedy Trial Act. In addition, appellant Proctor contends that there was insufficient evidence to sustain a conviction against him on one of the counts. Finally, appellants Proctor and Mummert contest their sentences on the ground that the district court improperly refused to strike the testimony of a Government witness at the sentencing hearing or, alternatively, to recall the witness for cross-examination. We affirm the convictions and sentences of all appellants.

I. Wiretap Evidence

The evidence presented at trial included videotapes of meetings and tape recordings of telephone conversations between appellants and Darryl Cosme, a United States Customs Service agent who posed as a pornography distributor and who consented to the wiretap surveillance. Both federal and state law-enforcement officials participated in the interceptions and recordings of the meetings and conversations. Appellants concede that under 18 U.S.C. section 2511(2)(c), the interceptions and recordings were lawful as consensual wiretaps. However, appellants argue that the interceptions and recordings were illegal under the law of the State of Hawaii and that, therefore, evidence obtained from these activities was not

admissible in federal court.

We need not reach the issue of the legality of the interceptions and recordings under Hawaii law, for this circuit has established a clear and simple rule that evidence obtained from a consensual wiretap conforming to 18 U.S.C. section 2511(2)(c) is admissible in federal court proceedings without regard to state law. United States v. Hall, 543 F.2d 1229, 1234-35 (9th Cir. 1976) (en banc), cert denied, 429 U.S. 1075 (1977), United States v. Keen, 508 F.2d 986, 989 (9th Cir. 1974), cert denied, 421 U.S. 929

(1975).[1] Since the interceptions and recordings that occurred here conformed to federal law, the district court did not err in admitting evidence obtained from these activities.

II. Speedy Trial Act

Appellants Proctor, Shingaki, and Mummert sought to dismiss five of the counts against each of them on the ground of undue delay. They invoke a provision

---

[1]Appellants seek to distinguish Hall and Keen on the basis that only federal officers participated in the wiretaps at issue in those two cases, while here state officers assisted in the wiretap surveillance activities. This factual difference is irrelevant to the applicability of the doctrine articulated in Hall and Keen, which is based on the fundamental principle that the bounds of federal admissibility are not subject to determination by the state. Hall, 543 F.2d at 1235.

of the Speedy Trial Act, 18 U.S.C. section 3161(b). That provision mandates that any information or indictment charging an individual with the commission of an offense shall be filed within 30 days of the date of arrest in connection with such charges. Proctor, Shingaki, and Mummert were arrested by state officers on June 12, 1980. Because the investigation that led to their arrest was a joint federal-state investigation, appellants argue that the relevant time period for purposes of 18 U.S.C. section 3151(b) should be deemed to run from the date of the state arrest to the date of the federal indictment.

We join a unanimous body of case law in other circuits in holding that regardless of the degree of federal

involvement in a state investigation and arrest, only a federal arrest will trigger the running of the time period set forth in 18 U.S.C. section 3161(b). E.g., United States v. Iaquinta, 674 F.2d 260, 265-69 (4th Cir. 1982); United States v. Wilson, 657 F.2d 755, 767 (5th Cir. 1981) cert. denied, 103 S. Ct. 1456 (1982); United States v. Lai Ming Tanu, 589 F.2d 82,88 (2d Cir. 1978); United States v. Mejias, 522 F.2d 435, 441-42 (2nd Cir.), cert. denied, 434 U.S. 847 (1977). Proctor, Shingaki, and Mummert were arrested by federal authorities on August 7, 1982, the same day the federal indictment was filed. Since the indictment was filed before federal agents arrested appellants, the requirements of section 3161(b) of the Speedy Trial Act

were met and no undue delay occured.

III. Sufficiency of Evidence

Appellant Proctor challenges the sufficiency of the evidence to support his conviction on Count XII of the indictment, shipping pornographic materials involving minors in interstate and foreign commerce and the mails, for purposes of distribution and sale, in violation of 18 U.S.C. section 2252(a)(1). Contrary to Proctor's assertions, the conviction was not based solely on evidence of the lawful interception of a package of pornographic materials addressed to him; other evidence in the record also supports a conviction on this count. For example, there was evidence that several of the appellants, including Proctor, told agent Cosme that proctor intended to distribute

pornographic materials he had purchased in Europe. The record also shows that when his house was searched, Proctor admitted that he expected more pornographic materials in the mail. Therefore, the district court's finding that Proctor intended to distribute the intercepted materials was not speculative, and there was substantial evidence to support the conviction on that count.

IV. Sentencing Testimony

At a continuance of the sentencing hearing, appellants Proctor and Mummert moved to strike the earlier testimony of the Government's witness, Dr. Osanka, or, alternatively, to have the Government return Osanka for cross-examination. Appellants now contend that denial of this motion was a violation of their due

process rights. This contention is without merit.

While a criminal defendant is entitled to due process in the sentencing procedure, the range of due process rights at sentencing is not as extensive as that at trial. Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977); United States v. Morgan, 595 F.2d 1134, 1136 (9th Cir. 1979). Proctor and Mummert were offered, but declined an opportunity to cross-examine Dr. Osanka immediately following his testimony. Moreover, Proctor and Mummert presented their own witnesses, Dr. Wolfgang, to rebut Dr. Osanka'a testimony. Under these conditions, the district court did not abuse its discretion in finding that appellants had been given an

adequate opportunity to rebut Dr. Osanka's testimony and in refusing to strike the testimony or to recall Dr. Osanka for cross-examination.

For the reasons stated above, the convictions and sentences are AFFIRMED.

IN THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CR. NO. 81-01080
Plaintiff,	)	
vs.	)	
RAYMOND JAMES PROCTOR, JENI MUMMERT, a/k/a "Jeni Proctor", HELGA MARIE ADAMS, and MASARU SHINGAKI,	)	
Defendants.	)	

ORDER DENYING DEFENDANTS'
MOTION TO SUPPRESS EVIDENCE

Appendix B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ORDER DENYING DEFENDANTS'
MOTION TO SUPPRESS EVIDENCE

By motion dated October 22, 1981, Defendant Helga Marie Adams, pursuant to Fed. R. Crim. P. 12(b) and 41(e), moves this Court for an order suppressing the use as evidence of all evidence obtained or derived from the interception of wire or oral communications made or participated in by Defendant. Defendants Raymond James Proctor, Masaru Shingaki and Jeni Mummert joined in the motion.

STATEMENT OF FACTS

On August 7, 1981, the Federal Grand Jury returned a twelve count indictment against Defendants. The Grand Jury

indicted each co-defendant (Masaru Shingaki, Helga Marie Adams and Jeni Mummert, aka "Jeni Proctor") on one count of conspriracy to violate 18 U.S.C. section 2252(a)(2) and on four counts alleging substantive violations of 18 U.S.C. section 2252(a). This same indictment charges co-defendant Raymond James Proctor with one count of conspiracy, ten counts alleging violations of 18 U.S.C. section 2252(a)(2) and one count alleging violation of 18 U.S.C. section 2252(a)(1). Sections 2252(a)(1) and (2) proscribe the distribution and receipt with the intent to distribute, in interstate or foreign commerce or by the use of the mails, of obscene print and visual media involving the use and depiction of children under the age of

sixteen.

The investigation which led to the Federal Grand Jury indictment was initiated as a joint federal and state undercover investigation. Law enforcement agents from the U.S. Customs Service and the Honolulu Police Department cooperated by pooling their resources and manpower in the investigation of alleged violations of both federal and state laws. The investigation utilized the efforts of at least two Special Federal Agents and at least three Honolulu Police officers. This investigation included the recording, by means of tape recording, videotape and body (audio tape) recorder, of conversations and meetings that occurred between U.S. Customs Special Agent Darryl

Cosme, acting in an undercover capacity, and each of the defendants.

The recordings were made between the dates of May 9, 1980, and May 20, 1980. All of the recorded conversations and meetings where taken with the consent of Special Agent Cosme. Agent Cosme was a party to each of the recorded conversations. No other wiretapping or electronic recording of defendants' conversations or meetings were taken, either among themselves or with other individuals.

Defendants' principal contention in seeking to suppress the evidence resulting from these recordings is that the recordings were made in violation of state law and are illegal under Title III of the

Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. section 2510 et seq. (Title III). Defendants' argument can be summarized as follows:

(1) Under Hawaii state law as recently announced in State of Hawaii v. Okubo, Crim. No. 55211 (Cir. Ct. 1st Cir. September 4, 1982), appeal docketed, No. 8286 (Supreme Court of Hawaii), notwithstanding one party's consent to the electronic recordig of face-to-face conversations, it is an invasion of the right of privacy and a violation of Article I, section 7 of the Hawaii Constitution and Hawaii Rev. Stat. section 803-42(b)(3) to make such recordings without a duly authorized warrant issued prior to the electronic recording.

(2) Title III controls the

federal use of any evidence taken by means of wiretapping and other forms of electronic surveillance. Under this chapter, evidence obtained by the interception of wire and oral communications is inadmissible in a federal prosecution "if disclosure of that information would be in violation of this chapter." 18 U.S.C. section 2515.

(3) Defendants agree that federal law as contained in Title III generally preempts conflicting state law under the Supremacy Clause. However, Defendants argue that Title III creates a specific exception where state law enforcement officials are involved in electronic surveillance for state prosecutorial purposes. In this instance Title III adopts and incorporates state law if

the state has adopted requirements which are more restrictive than those embodied as "minimum requirements" in Title III. Defendants argue that the language and legislative history ot Title III clearly reflects Congress' intent to reserve to the states the right to protect privacy under state law to a greater extent than does Title III.

(4) Accordingly, Defendants argue that Hawaii's more restrictive law, i.e., that consensual wiretaps are an invasion of the right of privacy and hence illegal when made without a court warrant, is incorporated into federal law via the Title III exception. Inasmuch as the actions of the Hawaii law enforcement officials constitute the interception of protected communication by means not in

accordance with Title III, testimony disclosing the contents of such an illegal interception is not admissible.

Defendants argue that section 2516(2) of Title III is the clearest and best illustration of the Act's intent to reserve and defer to the state the right to regulate the conduct of its own officers and the conduct of electronic surveillance. Section 2516(2) provides in pertinent part:

> The principal prosecuting attorney of any State . . . may apply to such [State] judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State Statute an order authorizing, or approving the interception of wire or oral communications. . . .

Defendants rely on dictum in United States v. Hall, 543 F.2d 1229 (9th Cir. 1976) for support of this contention. In reaching its decision in Hall, the Ninth Circuit noted that since the federal agents were authorized to obtain the wiretap under Title III, federal law controlled. Although the court state that "[i]t may well be true . . .that the federal act does not preclude the states from enacting more restrictive wiretapping statues of their own," id. at 1232, it specifically held that:

> To the extent that there is a conflict between the state and federal legislation, . . .the federal statute controls under the Supremacy Clause of the Constitution. Article VI, cl. 2. The state law

> cannot preempt the federal unless the federal act itself sanctions the application of state standards. That is not the case here.

Id.

Thus, the court added:

> Federal officers are authorized to wiretap under section 2516(1), regardless of the provisions of state law. It is only wiretapping by state officers under section 2516(2) which requires further authorization by state statutes . . . . With the lone exception concerning the interception by state officers for state prosecutions, the federal statute does not defer to the states.

Id.

Defendants' argument fails to consider the effect of 18 U.S.C. section

2511(2)(c) of Title III which expressly states:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. [emphasis added].

Under section 2511(2)(c), all recordings which involve the consent of one party to a conversation are exempted from Title III's general prohibition of judicially non-authorized wiretaps. United States v. Horton, 601 F.2.d 319, 323 (7th Cir. 1979); United States v. Keen, 508 F.2d 986, 988 (9th Cir. 1974), cert. denied,

421 U.S. 929 (1975). This section leaves intact prior law upholding the constitutionality of consensual recordings. United States v. Keen, supra, 508 F.2d at 988. See also United States v. White, 401 U.S. 745 (1971).

It is still the prevailing federal law that warrantless recordings of conversations do not violate the Fourth Amendment where one party to the conversation consents to the recording. United States v. White, supra; Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952). Accord, United States v. King, 587 F.2d 956 (9th Cir. 1978); United States v. Testa, 548 F.2d 847 (9th Cir. 1977).

Defendants have attempted to

emphasize the point that it is their expectation of privacy rather than their Fourth Amendment rights which are at jeopardy here. The Supreme Court in White, supra, addressed the relationship between the right of privacy and the Fourth Amendment. An accused has no justifiable expectation of privacy that his conversations with his companions, whose trustworthiness he necessarily risks, will not be so recorded. As the court posed the question:

> Our problem . . . is what expectations of privacy are constitutionally 'justifiable'--what expectations the Fourth Amendment will protect in tha absence of a warrant. So far, the law permits the frustration of actual expectation of privacy by permitting authorities to use the testimony of

> those associated who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants . . . If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.

Id. at 752.

The Government argues that the fallacy in defendants' reliance on the Ninth Circuit's reference to section 2516(2) in Hall rests on the fact that under section 2511(2)(c), the provisions of section 2516(2) do not apply to consensual recordings. In Hall, the Ninth

Circuit was presented with a situation involving a non-consensual wiretap, and therefore the court had no need to spell out the applicability of the terms of section 2511(2)(c) to consensual recordins. This Court agrees.

United States v. Keen, supra, supports this Court's and Plaintiff's position. In Keen, a government agent had recorded a conversation between the appellant and an informer, with the informer's consent. In rejecting appellant's contention that the recordings were inadmissible because they violated a State of Washington statute which requires the consent of all parties to the conversation, the Ninth Circuit expressly held:

> Wire taps obtained with the consent of one party to a conversation do not violate the Fourth amendment. . . .

Id. at 989. Because no Fourth Amendment violation had occurred, the court noted that the exclusionary rule did not mandate suppression of the recordings:

> Keen overlooks the fact that the exclusionary rule is a remedy integrally bound up with the constitutional protections of the fourth amendment . . . . The Supreme Court . . . has restricted its application in wiretap cases to those whose fourth amendment rights have been violated.

Id. at 989-89.

Thus, the Ninth Circuit concluded in Keen:

> [W]iretap evidence

> obtained in violation of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law.

Id. at 989.

The Keen holding was reaffirmed by the Ninth Circuit in United States v. Testa, supra, wherein the court held that the consensual recordings involved were admissible in federal court even though they violated California and Nevada wiretapping statutes. The court stated:

> [R]egardless of their viability as state laws, these state provisions do not govern the question of admissibility in federal court.

Id. at 856.

As this Court concludes that section 2511(2)(c) of Title III permits the use in

federal court of wiretaps without a warrant when one party consents, regardless of the law of the state in this area, the Court need not determine whether state law imposes "more rigorous requirements" than federal law.[1]

Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Suppress Evidence Obtained or Derived from the Interception of Wire or Oral

---

[1] State of Hawaii v. Okubo, supra, is pending appeal in the Supreme Court of Hawaii. The Government also cites two cases in the Circuit Court of the First Circuit, State of hawaii, which are contrary to the Okubo decision: State of Hawaii v. Harris, Crim. No. 55905 (Cir. Ct. 1st Cir. November 6, 1981) and State of Hawaii v. Galaza, Crim. No. 55080 (Cir. Ct. 1st Cir. June 30, 1981).

Communications be and hereby is DENIED.

DATED: Honolulu, Hawaii,
November 25, 1981.

Samuel P. King
United States District Judge

UNITED STATES COURT
OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	82-1121
Plaintiff-Appellee,	)	82-1139
	)	82-1179
	)	No. 82-1180
vs.	)	
	)	DC CR 81-01080-3
HELGA MARIE ADAMS,	)	-4
MASARU SHINGAKI,	)	-2
JENI MUMMERT a/k/a JENI PROCTOR, and	)	-1 SPK
RAYMOND JAMES PROCTOR,	)	JUDGMENT
Defendants-Appellants.	)	

APPEAL from the United States District Court for the District of Hawaii.

THIS CAUSE came on for hearing on the Transcript of the Record from the United States District Court for the

District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 7, 1982

Section 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who-

(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if-

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; or

(2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if-

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct;

Section 2511(2)(c)

(c) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Section 2516(1)

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of-

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105

(relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restriction on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operation of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension

and welfare funds), or sections 2314 and 2315 (interstate transporation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State

statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Section 2517(1)(2)

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any mean authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the

extent such use is appropriate to the proper performance of his official duties.

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982

HELGA MARIE ADAMS, JENI MUMMERT, a/k/a
JENI PROCTOR, and RAYMOND JAMES PROCTOR,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

Proof of Service - Certificate
By Bar Member

EARLE A. PARTINGTON
Suite 200
250 S. Hotel Street
Honolulu, Hawaii 96813
(808) 533-7491
Attorney for Petitioners

Proof of Service-Certificate
By Bar Member

I, EARLE A. PARTINGTON, one of the attorneys for HELGA MARIE ADAMS, JENI MUMMERT, a/k/a JENI PROCTOR, and RAYMOND JAMES PROCTOR, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of February, 1983, I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On the United States, by leaving three copies thereof at the office of DANIEL A. BENT, Esq., United States Attorney for the District of Hawaii, at Room C-242, PJKK Federal Building, Honolulu, Hawaii, and by mailing three

copies in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On HELGA MARIE ADAMS and JENI MUMMERT, Petitioners, by mailing three copies to each in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

PAUL A. TOMAR, Esq.
Attorney for HELGA MARIE ADAMS
Suite 2007
Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

PAMELA J. BERMAN, Esq.
Attorney for JENI MUMMERT
Suite 1105
1188 Bishop Street
Honolulu, Hawaii 96813

EARLE A. PARTINGTON
Attorney for Petitioner
RAYMOND JAMES PROCTOR
Suite 200
250 S. Hotel Street
Honolulu, Hawaii 96813
(808) 533-7491

Office-Supreme Court, U.S.
FILED
MAY 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1427

In the Supreme Court of the United States

OCTOBER TERM, 1982

HELGA MARIE ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether evidence obtained pursuant to consensual wiretaps, legal under federal law but allegedly illegal under state law, was properly admitted in a federal prosecution.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Elkins v. *United States*, 364 U.S. 206 ..... 5, 6, 7

Hawaii v. *Galaza*, Cr. No. 55080 (1st Cir. Hawaii June 30, 1981) 6

Hawaii v. *Harris*, Cr. No. 55905 (1st Cir. Hawaii Nov. 6, 1981) 6

Hawaii v. *Okubo*, Cr. No. 55122 (1st Cir. Hawaii Sept. 4, 1981), appeal pending, No. 8286 (Sup. Ct. Hawaii) 6

United States v. *Antelope*, 430 U.S. 641 8

United States v. *Daniel*, 667 F.2d 783 5

United States v. *Hall*, 543 F.2d 1229, cert. denied, 429 U.S. 1075 ..... 4, 5, 6

United States v. *Horton*, 601 F.2d 319, cert. denied, 444 U.S. 937 5

United States v. *Keen*, 508 F.2d 986, cert. denied, 421 U.S. 929 ..... 4, 5

Page

Cases—Continued:

United States v. *Lovasco*, 431 U.S. 783 7

United States v. *Nelligan*, 573 F.2d 251 5

United States v. *Neville*, 516 F.2d 1302 5

United States v. *Shaffer*, 520 F.2d 1369, cert. denied, 423 U.S. 1051 ..... 5, 7

United States v. *Yazzie*, 693 F.2d 102 7

United States v. *Zemek*, 634 F.2d 1159, cert. denied, 450 U.S. 985 5

Wolf v. *Colorado*, 338 U.S. 25 6

Constitution, statutes and rule:

U. S. Const. Amend. IV 6, 7

Federal Youth Corrections Act, 18 U.S.C. 5010(e) 2

Major Crimes Act:

18 U.S.C. 1111 8
18 U.S.C. 1153 8

Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. (& Supp. V) 2510 *et seq.* :

18 U.S.C. 2511(1) 4
18 U.S.C. 2511(1)(c) 5
18 U.S.C. 2511(1)(d) 5
18 U.S.C. 2511(2) 4
18 U.S.C. 2511(2)(c) 3, 4
18 U.S.C. 2516(2) 3, 4
18 U.S.C. 2517(1) 4
18 U.S.C. 2517(2) 4

Page

Constitution, statutes and rule—Continued:

18 U.S.C. 371 2
18 U.S.C. 2252(a)(1) 2
18 U.S.C. 2252(a)(2) 2
18 U.S.C. 4205(c) 2

Fed. R. Evid. 402 5

Miscellaneous:

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) 5

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1427

HELGA MARIE ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 694 F.2d 200. The opinion of the district court (Pet. App. B1-B19) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C1-C2) was entered on December 7, 1982. The petition for a writ of certiorari was filed on February 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 7, 1981, a federal grand jury in the District of Hawaii returned a 12-count indictment charging petitioners with offenses relating to obscene materials that involve the sexual exploitation of minors. Count 1 charged all petitioners with conspiring to receive for the purpose of distribution for sale, and to sell and distribute for sale,

obscene visual and print media, the production of which used and depicted minors engaging in sexually explicit conduct, in violation of 18 U.S.C. 371. Counts 2 through 5 charged all petitioners with specific substantive offenses, in violation of 18 U.S.C. 2252(a)(2). Counts 6 through 11 charged petitioner Proctor with additional substantive offenses, also in violation of 18 U.S.C. 2252(a)(2), and Count 12 charged him with transport of the same type of materials, in violation of 18 U.S.C. 2252(a)(1). After a bench trial, petitioners were convicted as follows: Proctor, Counts 1, 2, 3, 4 and 12; Adams, Counts 1, 3 and 4; Mummert, Count 4.[1]

Petitioner Proctor was sentenced to five years' probation on Count 1, and concurrent ten-year terms of imprisonment on Counts 2, 3, 4 and 12, subject to later modification following a study as provided in 18 U.S.C. 4205(c). Petitioner Adams was sentenced to five years' probation on Count 1 and concurrent four-year terms of imprisonment on Counts 3 and 4. Petitioner Mummert was committed to the custody of the Attorney General for observation and study under the Federal Youth Corrections Act, 18 U.S.C. 5010(e).

2. The investigation that led to this prosecution was initiated as a joint federal and state undercover investigation of alleged violations of both federal and state laws regarding child pornography (Pet. App. B3). As part of the investigation, United States Customs Agent Darryl Cosme posed as a pornography distributor, and between May 9 and 20, 1980, he recorded—by means of tape recording,

---

[1]Also charged on Counts 1 through 5 was co-defendant Shingaki. He was convicted on Counts 1, 2, 3 and 4, and was sentenced to five years' probation on Count 1 and concurrent four-year terms of imprisonment on the remaining counts.

video tape and body (audio tape) recorder—his conversations and meetings with petitioners (*id.* at B3-B4). A Honolulu Police Department officer installed the tape recording and videotaping equipment, and each conversation or meeting was monitored by both a local police officer and a United States customs officer (E.R. 197-199).[2] Agent Cosme was a party to each of the recorded conversations, and he gave his consent to each recording (*ibid.*; Pet. App. B4).

3. Prior to trial, petitioners moved for an order suppressing all evidence obtained or derived from the interception of wire or oral communications between them and Agent Cosme. Petitioners argued that this evidence was obtained in violation of Hawaii law, which, they contended, had been adopted and incorporated into federal law by a provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2516(2).[3] The district court denied the motion (Pet. App. B1-B19). The court ruled that the intercepted conversations were exempt from the provisions of Title III in light of 18 U.S.C. 2511(2)(c), which provides that warrantless recordings of conversations are not unlawful so long as one party to the conversation consents to the recording (Pet. App. B10-B12, B17-B18).

On appeal, petitioners again claimed that, despite the consensual nature of the interceptions, the conversations could not be admitted because they violated Hawaii law (Pet. A3-A4). The court of appeals summarily disposed of the claim on the basis of clear circuit precedent that "evidence obtained from a consensual wiretap conforming to

---

[2]"E.R." refers to the Excerpts of Record in the court of appeals.

[3]Section 2516(2) establishes procedures to be followed by state prosecutors seeking wiretap authorizations from state court judges. It requires compliance with applicable state statutes as well as the provisions of Title III.

18 U.S.C. section 2511(2)(c) is admissible in federal court proceedings without regard to state law. *United States* v. *Hall*, 543 F.2d 1229, 1234-35 (9th Cir. 1976) (*en banc*), cert. denied, 429 U.S. 1075 (1977); *United States* v. *Keen*, 508 F.2d 986, 989 (9th Cir. 1974), cert. denied, 421 U.S. 929 (1975)" (Pet. App. A4-A5).

ARGUMENT

Petitioners contend (Pet. 8-16) that the decision of the court of appeals (1) contravenes the intent of Congress to incorporate state wiretap standards into Title III, thereby encouraging lawless behavior by state law enforcement officials, and (2) deprives petitioners of equal protection of the laws. Petitioners' contentions are without merit and have been rejected by every court of appeals that has had occasion to consider them.

1. Petitioners' argument that Congress intended state wiretap standards to govern the admissibility of evidence in federal court arises from a fundamental misapprehension of the scope of Title III. Section 2511(1) sets forth the prohibitions concerning interception of oral and wire communications. Section 2511(2) specifically exempts certain interceptions from the coverage of Title III. Among the explicitly exempted interceptions are those by "a person acting under color of law * * * [who] is a party to the communication * * *" (18 U.S.C. 2511(2)(c)). The remaining provisions of Title III, including those applicable when permission to intercept is sought from a state court judge (18 U.S.C. 2516(2)), do not apply to exempted interceptions. That simple proposition was the basis for the correct conclusion by the court of appeals that the challenged interceptions were properly admitted in this federal proceeding.[4]

---

[4]Petitioners contend (Pet. 12) that Section 2517(1) and (2), governing disclosures of intercepted conversations by any law enforcement official "to the extent such use is appropriate to the proper performance of [his]

The court of appeals also correctly refused to reach the question whether the interceptions violated Hawaii law. Whether evidence is admissible in a federal court is a question of federal law, see, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960); *United States* v. *Zemek*, 634 F.2d 1159, 1164 n.4 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); Fed. R. Evid. 402, and federal law clearly permits the admission of consensual wiretap evidence irrespective of whether it conforms to state wiretap standards. See, *e.g.*, *United States* v. *Horton*, 601 F.2d 319, 323 (7th Cir.), cert. denied, 444 U.S. 937 (1979); *United States* v. *Nelligan*, 573 F.2d 251, 253 (5th Cir. 1978); *United States* v. *Hall*, *supra*, 543 F.2d at 1234-1235; *United States* v. *Shaffer*, 520 F.2d 1369, 1371-1372 (3d Cir. 1975), cert. denied, 423 U.S. 1051 (1976); *United States* v. *Neville*, 516 F.2d 1302, 1309 (8th Cir. 1975); *United States* v. *Keen*, *supra*, 508 F.2d at 989.[5]

---

official duties," incorporates state standards. The courts to which that argument has been addressed have rejected it, concluding instead that the provision was intended "to protect the public from unnecessarily widespread dissemination of the contents of interceptions and from the wholesale use of information gleaned from a legal wiretap by an officer—state or federal—for personal or illegal purposes." *United States* v. *Hall*, *supra*, 543 F.2d at 1233; *United States* v. *Daniel*, 667 F.2d 783, 784 (9th Cir. 1982). Petitioner cites no authority to the contrary.

Petitioners' only other argument for the proposition that Hawaii law is not preempted by Title III's exemption for consensual wiretaps is the statement in the Senate Report that "[t]here is no intent to preempt State law." S. Rep. No. 1097, 90th Cong., 2d Sess. 93 (1968). But petitioners neglect to point out that this sentence appeared in a discussion of 18 U.S.C. 2511(1)(c) and (d), which govern the disclosure or use of the contents of intercepted communications by people who know or have reason to know that the information was obtained through an interception in *violation* of Title III. The passage thus has no bearing on the question in this case.

[5]Moreover, it is not at all clear that Hawaii law regarding consensual recordings is more restrictive than federal law. Petitioners rely on language in the Hawaii State Constitution (Pet. 2-3), but that language

Petitioners nevertheless argue (Pet. 11) that the effect of the court of appeals' decision is to encourage state law enforcement officers to violate state law, thereby " 'endors-[ing] a novel variation on the sort of illegal trade-off repudiated by [this] Court in *Elkins* v. *United States*, 364 U.S. 206 (1960),' " quoting *United States* v. *Hall*, *supra*, 543 F.2d at 1237 (Koelsch, J., dissenting). This claim ignores the rationale of *Elkins*.

In *Elkins*, the Court invoked its supervisory power over the lower federal courts to hold that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial" (364 U.S. at 223; footnote omitted). After *Wolf* v. *Colorado*, 338 U.S. 25 (1949), both logic and concern for judicial integrity compelled that result. See *Elkins*, 364 U.S. at 213-216, 222-223. The effect of *Elkins* was that no federal officer would be able to circumvent the requirements of the Constitution by resort to his state counterpart. Contrary to petitioners' argument, the decision below does not turn *Elkins* on its head. It simply recognizes that, even if evidence is obtained in violation of state law (but see note 5, *supra*), it is admissible in a federal criminal proceeding so long as it was obtained in a manner that comports with federal law. Any speculation

---

does not explicitly address the factual situation presented here, and there is as yet no Hawaii Supreme Court decision resolving the conflicting lower state court decisions. See *Hawaii* v. *Okubo*, Cr. No. 55122 (1st Cir. Hawaii Sept. 4, 1981), appeal pending, No. 8286 (Sup. Ct. Hawaii) (E.R. 115-149); *Hawaii* v. *Harris*, Cr. No. 55905 (1st Cir. Hawaii Nov. 6, 1981) (E.R. 166-168); *Hawaii* v. *Galaza*, Cr. No. 55080 (1st Cir. Hawaii June 30, 1981) (E.R. 172-177). In the absence of a definitive ruling by the Hawaii Supreme Court, this Court should not presume that Hawaii law is any more restrictive than federal law on the subject of consensual recordings.

that the decision encourages a Hawaii law enforcement official to violate state law is a policy argument that is more properly addressed to the Hawaii courts and legislature than the federal courts. See *Elkins*, 364 U.S. at 221 ("The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way"); see also *United States* v. *Shaffer*, *supra*, 520 F.2d at 1372.

2. Petitioners' final argument—that the decision below deprives them of equal protection of the laws—is raised in this Court for the first time. Absent exceptional circumstances not present in this case, this Court will not decide a question that was not presented to the courts below. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the argument is frivolous.

Petitioners claim that Title III sets up two classes of people—those whose conversations are intercepted by state officers through a consensual wiretap and those whose conversations are intercepted by state officers pursuant to a state warrant. While that claim may be correct, it does not make out an equal protection violation. It is simply a statutory distinction based on the rational decision that one type of interception implicates no Fourth Amendment interest requiring a warrant.[6] Classification is endemic to all legislation. Only legislation that treats similar people differently or different people as if they were the same offends the principle of equal protection. Title III does no such thing.

---

[6]That Congress has decided that an application to a state judge for a warrant also requires conformance to state law is similarly a rational, non-discriminatory distinction, *United States* v. *Yazzie*, 693 F.2d 102, 104 (9th Cir. 1982), that happens also to satisfy petitioners' concern (Pet. 15-16) for federal-state comity.

What petitioners are really saying is that their conversations might have been treated differently under state law. This Court answered that argument in *United States* v. *Antelope*, 430 U.S. 641 (1977), in which Indians challenged the application to them of a felony-murder provision, 18 U.S.C. 1111, under the federal Major Crimes Act, 18 U.S.C. 1153, for an offense committed on an Indian reservation in Idaho, a state that does not have a felony murder provision. This Court held that "it is of no consequence that the federal scheme differs from a state criminal code * * *. Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter" (430 U.S. at 648-649; footnotes omitted). There is no need to address this issue again.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

GLORIA C. PHARES
Attorney

MAY 1983

DOJ-1983-05